Nos. 18-422, 18-726

IN THE

Supreme Court of the United States

ROBERT A. RUCHO, *et al.*,

Appellants,

v.

COMMON CAUSE, *et al.*,

Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

LINDA H. LAMONE, *et al.*,

Appellants,

v.

O. JOHN BENISEK, *et al.*,

Appellees.

On Appeal from the United States District Court for the District of Maryland

BRIEF OF *AMICI CURIAE* HISTORIANS IN SUPPORT OF APPELLEES

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INTEREST OF *AMICI CURIAE*

Amici are historians with a scholarly interest in the origins and adoption of the Constitution, including a particular interest in the development and evolution of American ideas about political representation. *Amici* believe that a historical understanding of these ideas, and of the practice and perception of various forms of gerrymandering in American history, may assist the Court in its analysis of the legal issues presented in this case.[1] *Amici*, whose professional backgrounds and relevant publications are set forth in the Appendix, are:

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SUMMARY OF ARGUMENT

Fair and effective representation was the bedrock principle of constitutional governance in the new American republic. The historical record surrounding the Constitution offers ample evidence of that: The Founding generation forcefully rejected the British system of government, where legislative corruption and entrenchment of factions eroded meaningful representation, and instead designed a form of government that would be dependent on the People and responsive to the People. Americans were acutely aware of the dangers to that form of fair and effective representation posed by what we now call gerrymandering. They were particularly concerned that legislative factions acting for their own hyper-partisan interests would manipulate election rules and stifle political expression in order to entrench themselves. Those concerns are reflected in Article I, the First Amendment and subsequently the Fourteenth Amendment. Moreover, through Article III, the Framers established the judiciary as the bulwark against intentional overreach by the legislative majority. The Framers' efforts to prevent the improper legislative entrenchment that results from extreme partisan gerrymandering cannot be squared with an argument that they intended to exclude the courts from taking appropriate action where necessary to uphold the principles embodied in the Constitution.

Amici seek to bring to this Court's attention the historical record surrounding the founding principles and values that should inform the analysis of partisan gerrymandering. Because these cases do not turn on the linguistic meaning of any particular phrase in the

relevant constitutional provisions, *amici* focus on the fundamental substantive founding principles, their implementation in the Constitution, and the historical debates at the framing and ratification of the Constitution relating to the issues surrounding partisan gerrymandering.

ARGUMENT

I. THE FRAMERS DESIGNED A SYSTEM OF REPRESENTATION *RESPONSIVE TO* THE PEOPLE AND CONTINUALLY *DEPENDENT ON* THE PEOPLE

A. The American Vision of Representative Democracy Was Based on a Legislature That Reflects the Body Politic and Is Responsive to Its Demands

The American Revolution was in no small part a rejection of the British theory of "virtual representation." The British theory held that those communities that sent no representatives to Parliament—including the American colonies—nevertheless were represented because members of the House of Commons were obliged to consider the greater good when legislating.[2] To the Founding generation, this idea was an object of ridicule.[3] Americans, whose colonial assemblies generally extended representation to new communities as they were organized, believed instead in a system of actual

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[2] *See* JOHN PHILLIP REID, THE CONCEPT OF REPRESENTATION IN THE AGE OF THE AMERICAN REVOLUTION 50-62 (1989).

[3] *See, e.g.*, BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 167-70 (1967) (explaining that virtual representation was met in the colonies "at once with flat and universal rejection, ultimately with derision"); EDMUND S. MORGAN, THE BIRTH OF THE REPUBLIC, 1763-89, at 24 (4th ed. 2013) (noting that the colonists "roundly rejected" the idea).

representation.[4] In the emerging American vision of representative democracy, legislative assemblies were meant to share the interests of the electorate and be responsive to its demands,[5] with the vote serving to bind representatives closely to their constituents.[6] It was "particularly essential" that the House of Representatives "have an immediate dependence on, [and] an intimate sympathy with[,] the people,"[7] to ensure "the consent of the governed" envisioned in the Declaration of Independence.[8]

Under this new vision of government, representatives would act as agents of the People[9] and remain responsive to their needs and desires.[10] Elected representatives were expected to inform

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[4] BAILYN, *supra*, at 161-75; REID, *supra*, at 128-36.

[5] *See* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 204 (1996) (discussing the concept of shared interests and its significance in securing accountability of representatives).

[6] *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 182 (2d ed. 1998) (noting that in actual representation "[t]he process of voting was not incidental to representation but was at the heart of it").

[7] THE FEDERALIST NO. 52, at 355 (James Madison) (J. E. Cooke ed., 1961).

[8] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[9] *See* THE FEDERALIST NO. 14, *supra*, at 83-84 (James Madison) (explaining that in a republic, the People "assemble" and administer government "by their representatives and agents").

[10] *See id.* NO. 16, at 102-03 (Alexander Hamilton); *id.* NO. 35, at 221 (Alexander Hamilton).

themselves of the preferences of their constituents and act on their behalf. The result would be a government that shares a "common interest" and maintains an "intimate sympathy" with the People.[11] At the same time, it was expected that representatives would act as a filter on those preferences, "refin[ing] and enlarg[ing] the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice, will be least likely to sacrifice it to temporary or partial considerations."[12] "Duty, gratitude, interest, [and] ambition itself" were to be "the chords by which [representatives] will be bound to fidelity and sympathy with the great mass of the people."[13]

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[11] *Id.* NO. 52, at 355 (James Madison).

[12] *Id.* NO. 10, at 62 (James Madison).

[13] *Id.* NO. 57, at 387 (James Madison). Some of the Framers advocated for a Congress that would think and act exactly like its constituents, effectively functioning as a "miniature" of the body politic. For example, Theophilus Parsons argued that "[t]he rights of representation should be so equally and impartially distributed, that the representatives . . . should be an exact miniature of their constituents." Theophilus Parsons, *The Essex Result* (1778), *reprinted in* 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA: 1760-1805, at 480, 497 (Charles S. Hyneman & Donald S. Lutz eds., 1983); *see also* John Adams, *Thoughts on Government* (1776) [hereinafter Adams, *Thoughts on Government*], *reprinted in* 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA: 1760-1805, *supra*, at 401, 403. Although the system of government ultimately adopted was more similar to that advocated by Madison, the conception of a close correspondence between the electorate and the legislature was common ground that framed the debate.

There was also a recognition that maintaining a responsive government requires more than just virtuous candidates; it requires keeping elected representatives *dependent on* the People.[14] Such dependence was to be achieved by establishing frequent elections and representation in proportion to the population:

> "The genius of Republican liberty, seems to demand on one side, not only that all power should be derived from the people; but, that those entrusted with it should be kept in dependence on the people, by a short duration of their appointments; and, that, even during this short period, the trust should be placed not in a few, but in a number of hands."[15]

In this way, the new government would not allow the abuses of power in the British system, where partisan factions were able to unjustly entrench electoral power.[16]

The American vision of representative democracy centered on actual representation has long been reflected in this Court's jurisprudence. *See, e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 565 (1964) ("[L]egislatures . . . should be bodies which are collectively responsive to the popular will."); *id.* at

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[14] *See, e.g.*, THE FEDERALIST NO. 57, *supra*, at 386 (James Madison).

[15] *Id.* NO. 37, at 234 (James Madison).

[16] *See* ROSEMARIE ZAGARRI, THE POLITICS OF SIZE 102-03 (1987).

565-66 (noting that the aim of legislative apportionment is "the achieving of fair and effective representation"); *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964) (referencing the "Constitution's plain objective of making equal representation for equal numbers of people").

B. The Founding Generation Rejected "Corruption" of Representation in the British System and Sought To Prevent Similar Undemocratic Entrenchment by Partisan Factions in the American System

At the time of the Framing, Americans saw the abuses of power in the British system, including unjust entrenchment of electoral power by partisan factions, as antithetical to their vision of representative government.[17] From the beginning, they were focused on eliminating the various forms of "corruption" that effectively defeated meaningful representation in Parliament.[18] As this Court has noted, the delegates to the Constitutional Convention

> "were quite aware of what Madison called the 'vicious representation' in Great Britain, whereby 'rotten boroughs' with few inhabitants were represented in Parliament on or almost on a par with cities of greater population. [James] Wilson urged that people must be represented as individuals, so that America would escape the evils of the

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[17] *See* ZAGARRI, *supra*, at 102-03.

[18] *See* RAKOVE, *supra*, at 208-12.

> English system under which one man could send two members to Parliament to represent the borough of Old Sarum while London's million people sent but four."

Wesberry, 376 U.S. at 14-15 (footnotes omitted). It was well known that "pocket boroughs," with small numbers of voters easily controlled by a dominant interest or aristocrat, were another tool used to defeat actual representation.[19]

To colonial Americans, the corruption in the parliamentary system was not merely an issue of numbers and suboptimal representation. Rather, it was central to the experience of unjust subjugation that led to the Revolutionary War.[20] The Founding generation believed that the legitimacy of governments created in the wake of that war depended on protecting the system of representation from such entrenched interests. Edmund Randolph warned the Constitutional Convention: "If a fair representation of the people be not secured, the injustice of the Govt. will shake to its foundations."[21]

The Framers knew the danger to fair and effective representation that partisan legislative factions could pose if they were able to entrench themselves in power regardless of the shifting views

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[19] *See, e.g.*, KIRSTIN OLSEN, DAILY LIFE IN 18TH-CENTURY ENGLAND 7 (1999).

[20] *See, e.g.*, BAILYN, *supra*, at 222-23; WOOD, *supra*, at 166.

[21] 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 580 (Max Farrand ed., 1911) [hereinafter RECORDS].

of the public. Madison identified England's boroughs as a "striking example" of inequitable government in which a faction was able to block reforms that might dislodge it from its disproportionate and undemocratic power.[22] Preserving representational equality came to be seen as the most important safeguard against such entrenchment.[23] John Adams argued in *Thoughts on Government* that, to prevent "the unfair, partial, and corrupt elections" of the English system, "equal interests among the people should have equal interests" in the legislature.[24] In response to similar concerns, several states included in their constitutions plans for periodic adjustments of representation.[25] Several states also adopted some form of a declaration "[t]hat the right in the people to participate in the Legislature, is the foundation of liberty and of all free government, and for this end all elections ought to be free and frequent."[26]

In short, the new American government was designed to be dependent on, and regularly accountable to, the People. In drafting the Constitution, the Framers saw it as imperative that the electoral process be protected against influences

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[22] *Id.* at 584.

[23] WOOD, *supra*, at 170.

[24] Adams, *Thoughts on Government*, *supra*, at 403.

[25] WOOD, *supra*, at 172 (noting adoption of such provisions in New Jersey, Pennsylvania, New York, Vermont, and South Carolina).

[26] *See* DEL. DECLARATION OF RIGHTS § 6 (1776); *see also* MD. CONST. art. V (1776); N.H. CONST. arts. X, XI (1784); VA. DECLARATION OF RIGHTS § § 5, 6 (1776).

that might infringe upon the right to fair and effective representation,[27] particularly partisan entrenchment by those already in power. Without fair and effective representation, the new republic would devolve into the very type of government Americans fought to separate themselves from—one plagued by "corruption," under which the electors cannot "defeat [the faction's] sinister views by regular vote."[28]

II. THE AMERICAN VISION OF REPRESENTATION IS REFLECTED AND PROTECTED IN THE FIRST AMENDMENT, THE FOURTEENTH AMENDMENT AND ARTICLE I

The historical record is replete with evidence that the Founding generation was focused on abuses that might erode the representative nature of government. The Constitution—in particular, Article I and the First Amendment—was drafted in part to avoid such abuses by the new national government. And in

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[27] Appellants argue that partisan gerrymandering claims require measuring any "deviation[] from a proportional representation baseline." Brief for Appellants at 21-22, *Rucho v. Common Cause*, No. 18-422 (Feb. 8, 2019). Appellants are correct that the Framers did not adopt a proportional representation system. But that choice only reinforces how important it was to the Framers that voters have a free, equal and effective voice in ***selecting*** their representatives. The system of representative government the Framers designed is founded on the principle that the People will elect representatives best suited to represent their interests and that those representatives will remain dependent on and accountable to the People through frequent, effective elections. *See supra* section I.A.

[28] THE FEDERALIST NO. 10, *supra*, at 60 (James Madison).

passing the Fourteenth Amendment, the 39th Congress extended this vision to the state level.

A. The First Amendment Was Intended To Protect American Representative Ideals by Ensuring the People Could Hold Representatives Accountable Through Political Expression, Including the Vote

Since its inception, the First Amendment has been closely intertwined with ideas of popular sovereignty and representation. The right of political expression was an integral part of colonial Americans' transition from subjects of the Crown to citizens possessing "the absolute sovereignty"[29] and employing government officials as "their servants and agents,"[30] required to be "at all times accountable to them."[31] It was the device through which the People could express their voice—and through voting, have it

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[29] James Madison, Report on the Resolutions (Jan. 1800) [hereinafter Madison, Report on the Resolutions], *reprinted in* 6 THE WRITINGS OF JAMES MADISON 341, 386-87 (Gaillard Hunt ed., 1906).

[30] 4 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 9 (J. Elliot ed., 2d ed. 1836) [hereinafter ELLIOT'S DEBATES] (statement of James Iredell).

[31] PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787-1788, at 250 (J. McMaster & F. Stone eds., 1888) (internal quotation marks omitted) (statement of John Smilie).

heeded—regarding the issues of the day and the performance of the government.[32]

The Framers recognized that the exchange of ideas by members of the public—unhindered by government interference—was essential for free elections and, in turn, an accountable government.[33] Madison argued that the American form of representative government required "the equal freedom" of political expression, particularly by "examining and discussing the[] merits and demerits" of candidates.[34] In opposing the Sedition Act, which criminalized malicious speech against the government, Madison argued that the Act violated the Constitution because it stifled dissemination of speech related to elections—a right necessary to keep government accountable[35] and to ensure all other rights:

> "[The Act] exercises . . . a power which, more than any other, ought to produce universal alarm, because it is levelled against the right of *freely examining* public characters and measures, and of *free communication* among

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[32] *See* WOOD, *supra*, at 164-65.

[33] *See* Madison, Report on the Resolutions, *supra*, at 397 ("[T]he right of electing the members of the Government constitutes more particularly the essence of a free and responsible government.").

[34] *Id.*

[35] *Id.* (rejecting the Sedition Act as a "protection of those who administer the Government" from being exposed to criticisms of the People).

> the people thereon, which has ever been justly deemed the only effectual guardian of every other right."[36]

Hamilton also emphasized the close connection between free speech and effective representation. In response to the claim of anti-Federalist writer "Brutus" that a republic is practicable only in a society without "constant clashing of opinions,"[37] Hamilton argued that it was those "differences of opinion, and the jarrings of parties in [the legislative] department of the government," that "promote deliberation and circumspection; and serve to check excesses in the majority."[38] Discouraging the "jarrings of parties" therefore runs directly counter to the foundational understanding of representative government, particularly when it is done by a partisan faction in power whose excesses the resulting opinions are meant to check.

The First Amendment prohibits government actors from stunting political expression in order to abuse or entrench their own power. As Madison explained, those in power may not restrict the right of political expression and thereby "derive an undue advantage for continuing themselves in it, which, *by impairing the right of election*, endangers the

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[36] James Madison, Virginia Resolutions of 1798, *reprinted in* 4 ELLIOT'S DEBATES, *supra*, at 528, 528-29 (emphasis added).

[37] BRUTUS I (Oct. 18, 1787), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 363, 369-70 (Herbert J. Storing ed., 1981).

[38] THE FEDERALIST NO. 70, *supra*, at 475-76 (Alexander Hamilton).

blessings of the Government founded on it[.]"[39] As one scholar has put it, "[t]he revolutionary intent of the First Amendment is . . . to deny [the government] authority to abridge the freedom of the electoral power of the people."[40] Beyond being one of those expressive activities by which "We, the People" exercise our rights to self-government, the vote is "the official expression of a self-governing [citizen's] judgment on issues of public policy," to be "absolutely protected" under the First Amendment.[41]

In sum, the Framers saw the unfettered right of citizens to express their views through political discourse, and ultimately the vote, as essential for maintaining effective representative rights and government accountability. Mechanisms that prevent translating popular will into actual representation by creating structural impediments to the effective exercise of particular voters' rights—such as partisan gerrymandering—are contrary to the First Amendment values that the Framers recognized as the cornerstone of a vibrant democracy.

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[39] Madison, Report on the Resolutions, *supra*, at 398 (emphasis added).

[40] Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 254.

[41] *Id.* at 256.

B. The Fourteenth Amendment Extended the Framers' Vision of Representative Government to the States

In the wake of the Civil War, proponents of the Fourteenth Amendment emphasized the need to strengthen and vindicate the Framers' concept of actual representation premised on equal rights. Reconstruction-era Republicans argued vigorously that the Framers' vision of a republic required equal representation of all citizens, and that this vision must prevail on the state level as well as the federal.[42] For example, in his famous "Equal Rights for All" speech, Senator Charles Sumner repeatedly invoked the Framers' rejection of "virtual representation"[43] and argued at length that "[t]he two ideas of Equality and a Right to Representation, so early and constantly avowed by the Fathers, are here again recognized as essential conditions of government; and this is the

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[42] President Lincoln had argued in his First Inaugural Address that "[a] majority, held in restraint by constitutional checks and limitations, and *always changing easily with deliberate changes of popular opinions and sentiments*, is the only true sovereign of a free people." Abraham Lincoln, The First Inaugural Address (Mar. 4, 1861), *in* DAVID LOWENTHAL, THE MIND AND ART OF ABRAHAM LINCOLN, PHILOSOPHER STATESEMAN 198, 201 (2012) (emphasis added). Lincoln echoed this sentiment in the Gettysburg Address, closing with the hope "that this nation, under God, shall have a new birth of freedom—and that government of the people, by the people, for the people, shall not perish from the earth." Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863), *in* LOWENTHAL, *supra*, at 228, 228.

[43] *See* Charles Sumner, The Equal Rights of All (Feb. 5-6, 1866), *in* 13 CHARLES SUMNER: HIS COMPLETE WORKS 119, 159-60, 170-72 (2d ed. 1900).

true definition of a Republic."[44] Proponents of the Fourteenth Amendment cast the former slave states as aristocracies and oligarchies that must henceforth be required to respect the Framers' vision of representational rights.[45]

Representative John Bingham, a champion of the Fourteenth Amendment, likewise described the Amendment as a way to finish the Framers' work by securing their actual-representation vision on the state level now that the natural barrier to doing so—slavery—had been abolished:

> "What more could have been added to that instrument to secure the enforcement of these provisions of the bill of rights in every State, other than the additional grant of power which we ask this day? Nothing at all. And I am perfectly confident that that grant of power would have been there but for the fact that its insertion in the Constitution would have been utterly incompatible with the existence of slavery in any State; for although slaves might not have been admitted to be citizens they must have been

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[44] *See id.* at 184.

[45] *See, e.g., id.* at 207-11; *see also* Charles O. Lerche, Jr., *Congressional Interpretations of the Guarantee of a Republican Form of Government During Reconstruction*, 15 J. SOUTHERN HIST. 192, 198 (1949).

> admitted to be persons. That is the only reason why it was not there."[46]

Other members of the 39th Congress shared Bingham's view that the Fourteenth Amendment was the only way to secure "the declared intent[ion] of the Constitution of [the] fathers" after the abolition of slavery.[47] For example, Ralph Buckland remarked that "[i]t is contrary to the fundamental principles of republican government" "to think that a mere fraction of the people of any of these States can control the State government for any great length of time."[48] Jacob Howard argued, quoting Madison, that "the vital principle of republican government" is "'that those who are to be bound by the laws ought to have a voice in making them.'"[49] This fundamental principle was echoed throughout the Reconstruction era. For example, Section 2 of the Fourteenth Amendment—ensuring that states received representation based on total population—included a provision to reduce representation in Congress should eligible voters have

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[46] CONG. GLOBE, 39th Cong., 1st Sess. 1090 (1866). The debates surrounding the Privileges or Immunities Clause of the Fourteenth Amendment also reveal a close tie between the intent of the 39th Congress and that of the Framers. *See, e.g., id.* at 1095 (statement of John Bingham) ("The amendment is exactly the language of the Constitution; that is to say, it secures to the citizens of each of the States all the privileges and immunities of citizens of the several States.").

[47] *Id.* at 430.

[48] *Id.* at 1627.

[49] *Id.* at 2767.

their right to vote "in any way abridged."[50] In 1870, the states ratified the Fifteenth Amendment, which explicitly protects "the right of citizens of the United States to vote."[51] This Court has recognized the existence of this strong "conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments." *Reynolds*, 377 U.S. at 558 (quoting *Gray v. Sanders*, 372 U.S. 368, 381 (1963)).

This Court has held that gerrymanders based on unequal population size violate the Fourteenth Amendment and "run counter to our fundamental ideas of democratic government." *See id.* at 564 (quoting *Wesberry*, 376 U.S. at 8). The same interference with the Founding generation's vision of fair and effective representation is accomplished by intentional partisan gerrymandering.[52]

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[50] U.S. CONST. amend. XIV, § 2.

[51] *Id.* amend. XV, § 1.

[52] One of Appellants' *amici* argues that "[t]he original intent of the authors of the Fourteenth Amendment could hardly include a political gerrymandering cause of action" because the authors themselves benefited from gerrymandering in getting elected. Brief of the Public Interest Legal Foundation as *Amicus Curiae* in Support of Appellants at 4-10, *Rucho v. Common Cause*, No. 18-422 (Feb. 12, 2019). This contention ignores that partisan gerrymandering has been publicly denounced throughout its history. As this brief details in Part III, partisan gerrymandering has existed since the Founding, but at every step of the way, including around the time the Fourteenth Amendment was passed, the practice was condemned—even by those who admitted benefiting from it. *See infra* section III.B.

C. Article I Reflects the American Vision of Representative Government and the Fear That Legislative Manipulations Would Impair That Vision

The Framers were acutely aware that the government's representative function could be undermined not just by restrictions on the franchise, but by malapportionment and what we now call gerrymandering. They were also aware that legislators would have the means and motive to manipulate election-related rules for partisan entrenchment, which they feared. The provisions of Article I represent the Framers' attempts to avoid such manipulation and ensure representative, responsive government.

Article I, Section 2 of the Constitution represents half of the Great Compromise reached by the delegates regarding the election of Congress: the House of Representatives was to be chosen directly "by the People"—as opposed to indirectly by the state legislatures—and in proportion to population.[53] Such a system embodied the founding principle that representatives be dependent on the People—the "great body of the society," not "an inconsiderable

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[53] Article I, Section 2 of the Constitution provides that "[t]he House of Representatives shall be composed of Members chosen every second Year *by the People of the several States*" and "Representatives . . . shall be apportioned among the several States . . . according to their respective Numbers." U.S. CONST. art. I, § 2 (emphasis added). In the Senate, on the other hand, each state would have two Senators, elected by the state legislatures. *See* U.S. CONST. art. I, § 3.

proportion, or a favored class of it."[54] For the House to be derived from the People, "equal numbers of people [would have] an equal number of representatives."[55] As Madison explained, "If the power is not immediately derived from the people, in proportion to their numbers, we may make a paper confederacy, but that will be all."[56] Thus, while original omissions from the electorate now seem glaring (*e.g.*, exclusions by race, gender, and economic circumstance), the Framers' concern at drafting was that the vote of each member of the existing electorate have equal weight. This Court has agreed with that interpretation, noting that "in its historical context, the command of Art. I, § 2, that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Wesberry*, 376 U.S. at 7-8 (footnote omitted).

The Framers also conceived of Article I, Section 2 as a way to maintain responsiveness and accountability of representatives while they held

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[54] THE FEDERALIST NO. 39, *supra*, at 251 (James Madison); *see also id.* NO. 57, at 384-85 (James Madison).

[55] *See* 5 ELLIOT'S DEBATES, *supra*, at 177. Similarly, Francis Dana argued that "the intention of the Convention was to set Congress on a different ground; that a part should proceed directly from the people, and not from their substitutes, the legislatures; therefore the legislature ought not to control the elections." 2 *id.* at 49.

[56] 1 *Id.* at 462.

office. Frequent elections and shorter terms of office[57] would deepen the "chords of sympathy" between representatives and their constituents.[58] The fact that the People's opportunity to vote out their representative was never remote would create in the representatives "an habitual recollection of their dependence on the people," forcing representatives to regularly "descend to the level from which they were raised."[59] Without such responsiveness, the Framers feared, "every government degenerates into tyranny."[60]

The decennial Census requirement in Article I, Section 2 was explicitly designed to avoid entrenchment and malapportionment that would preclude a government chosen by the People and responsive to the People. Edmund Randolph, who introduced the Census Clause, argued that it was necessary because the initial apportionment of representatives "placed the power in the hands . . . which could not always be entitled to it," and "this

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[57] *See* U.S. CONST. art. I, § 2, cl. 1 (settling on two-year terms); *see also* THE FEDERALIST NO. 57, *supra*, at 384 (James Madison) ("The means relied on in this form of government for preventing their degeneracy are numerous and various. The most effectual one, is such a limitation of the term of appointments, as will maintain a proper responsibility to the people.").

[58] THE FEDERALIST NO. 35, *supra*, at 221 (Alexander Hamilton).

[59] *Id.* NO. 57, at 386 (James Madison).

[60] *Id.* at 387.

power would not be voluntarily renounced."[61] The Census was pointedly aimed at representation. For example, George Mason observed that, without the Clause, "the Legislature would cease to be the Representatives of the people": If the Legislature were not constrained to redistribute representation in the future so that a majority of the people could elect a majority of the Legislature, then "the power w[oul]d be in the hands of the minority, and would never be yielded to the majority,"[62] which would "complain from generation to generation without redress."[63]

The Elections Clause in Article I in the first instance gives state legislatures the power to prescribe the "Times, Places and Manner of holding Elections" for the House and Senate.[64] From the beginning, the Framers were focused on ways it might be abused. Two delegates from South Carolina—a notably malapportioned state, with the larger plantations near the Atlantic Coast wielding unequal power over the state's legislative districting[65]—insisted that the states exclusively should be relied on to regulate districting.[66] Madison responded by warning that states would manipulate rules and districting for partisan political ends:

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[61] RECORDS, *supra*, at 579.

[62] *Id.* at 586.

[63] *Id.* at 578.

[64] U.S. CONST. art. I, § 4, cl. 1.

[65] *See* RAKOVE, *supra*, at 223.

[66] 5 ELLIOT'S DEBATES, *supra*, at 401.

> "It was impossible to foresee all the abuses that might be made of the discretionary power. Whether the electors should vote by ballot, or *viva voce*, should assemble at this place or that place, should be divided into districts, or all meet at one place, should all vote for all the representatives, or all in a district vote for a number allotted to the district[;] these, and many other points, would depend on the legislatures, and might materially affect the appointments. Whenever the state legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed. Besides, the inequality of the representation in the legislatures of particular states, would produce a like inequality in their representation in the national legislature, as it was presumable that the counties having the power in the former case would secure it to themselves in the latter."[67]

At the state conventions, the Clause was the subject of much debate. The Massachusetts Convention, for example, debated it over two days. Theophilus Parsons worried that state legislatures might, upon the influence of a faction, "introduce such regulations as would render the rights of the people insecure and of little value."[68] More specifically, Parsons imagined state legislatures "might make an

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[67] *Id.* at 401-02.

[68] 2 *Id.* at 27.

unequal and partial division of the states into districts for the election of representatives, or they might even disqualify one third of the electors."[69] The historical record demonstrates a clear concern at the Framing that state legislatures would overreach in ways that would dilute the vote and erode the representative nature of the new government through partisan entrenchment. As this Court has emphasized, the Elections Clause was *not* meant to give state legislatures authority to "dictate electoral outcomes." *See Cook v. Gralike*, 531 U.S. 510, 523 (2001) (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 833-34 (1995)).

The North Carolina Appellants and their *amici* argue that the Framers dealt with these concerns exclusively by vesting oversight in Congress. They argue—with no citations to the historical record—that the Framers through the Elections Clause not only assigned to Congress the primary responsibility for overriding state legislature misconduct in election redistricting, but affirmatively rejected any role for the federal judiciary. *E.g.*, Brief for Appellants at 2, *Rucho v. Common Cause*, No. 18-422 (Feb. 8, 2019) ("inappropriate for federal courts"); *id.* at 4; *id.* at 21 ("affirmatively inappropriate"); Brief of Speaker Michael C. Turzai, in His Official Capacity as Constitutional Officer of the Pennsylvania House of Representatives, as *Amicus Curiae* in Support of Appellants at 3-4, *Rucho v. Common Cause*, No. 18-422 (Feb. 12, 2019) ("necessarily excludes"); *id.* at 6 ("denies"); *id.* at 17 ("[d]eprives"); *id.* at 23 (courts as "threats"). Appellants assert it "never occurred to

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[69] *Id.*

anyone in the framing generation" that there would ever be any role for the courts in addressing apportionment. Brief for Appellants, *supra*, at 34; *see also id.* at 5, 32-33; Brief of Speaker Michael C. Turzai, *supra*, at 9. One *amicus* goes so far as to argue that "the Elections Clause forecloses judicial intervention on political grounds under *any* constitutional provision." Brief of Speaker Michael C. Turzai, *supra*, at 4.

These arguments misconstrue the historical record. Many of the delegates were worried that *Congress* would abuse its power under the Elections Clause to entrench itself. Some opponents of the Clause argued that it could give Congress the ability to "perpetuate itself indefinitely by cancelling elections."[70] Others were worried that the Clause would give Congress undue influence over the outcome of elections. For example, Charles Turner voiced the concern at the Massachusetts Convention that Congress could change the place of elections such that "representatives chosen will not be the true and genuine representatives of the people, but creatures of the Congress; and so far as they are so, so far are the people deprived of their rights, and the choice will be made in an irregular and unconstitutional manner."[71]

Therefore, although the Framers settled on Congress as the first line of defense if the *states* abused their power, it is unlikely, given the concerns

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[70] PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788, at 173 (2010).

[71] 2 ELLIOT'S DEBATES, *supra*, at 30.

about Congress, that the Framers saw Congress as the *only* defense. To the contrary, there is historical evidence that at least some expressly contemplated that the courts would intervene. For example, at the North Carolina Convention, John Steele assuaged concerns about Congress and the Elections Clause by noting "[t]he *judicial power* of that government is so well constructed as to be a check" and "[i]f the Congress make laws inconsistent with the Constitution, *independent judges will not uphold them*, nor will the people obey them."[72] That prediction of independent judges protecting the right to an effective vote has come true, as reflected in this Court's decisions regarding one-person one-vote. *See, e.g.*, *Wesberry*, 376 U.S. at 18.

The Framers took great care in establishing a representative government—one by the People and for the People. Fearing precisely the harms to that ideal government that partisan gerrymandering brings about, they provided protections throughout the Constitution—in Article I and the First Amendment (and subsequently the Fourteenth Amendment). And, as discussed next, in Article III the Framers created the system of checks and balances pursuant to which the judiciary could intervene if necessary when those provisions are violated.

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[72] 4 *Id.* at 71 (emphasis added).

III. THROUGH ARTICLE III, THE FRAMERS ESTABLISHED THE JUDICIARY AS AN IMPORTANT BULWARK AGAINST LEGISLATIVE OVERREACH AND MAJORITARIAN ENTRENCHMENT

Although Appellants and their *amici* argue that the Framers affirmatively intended to preempt any judicial review of congressional redistricting, such claims are demonstrably ahistorical. As noted above, the debates regarding the Elections Clause in particular included reference to the role of an independent judiciary. More generally, the Framers through Article III established the judiciary as an "impenetrable bulwark" against assumptions of power and violations of the Constitution. Throughout history, partisan gerrymandering has been publicly denounced as antithetical to the American vision of representative government, and there is no historical reason to suggest the Framers intended to eliminate any role for the judiciary in preventing improper legislative entrenchment.

A. The Framers Saw the Judiciary as a Means To Protect the People Against Abuses of Power and Violations of Constitutional Rights by the Legislature

Anticipating that elected representatives might attempt to augment their power or enact laws in contravention of the Constitution, the Framers designed a system of government in which the

judiciary acts as a check on legislative overreach.[73] The Founding generation had witnessed the effects of entrenchment of partisan legislative factions in England, which led them to reject the English approach of the legislature and judiciary being part of a single branch.[74] Instead, the judiciary would be an independent branch, "an impenetrable bulwark against every assumption of power in the legislative or executive."[75] At the ratifying conventions, several delegates emphasized the importance of judicial review in providing a check on encroachments by both the state and federal legislatures.[76] This power-

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[73] *See* THE FEDERALIST NO. 78, *supra*, at 526-27 (Alexander Hamilton) (recognizing that "the courts of justice are to be considered as the bulwarks of a limited constitution against legislative encroachments"); *see also* Adams, *Thoughts on Government*, *supra*, at 407 ("The dignity and stability of government in all its branches . . . depend so much upon an upright and skillful administration of justice, that the judicial power ought to be distinct from both the legislative and executive, and independent upon both, so that it may be a check upon both . . . .").

[74] *See* THE FEDERALIST NO. 81, *supra*, at 542-45 (Alexander Hamilton).

[75] 1 ANNALS OF CONG. 457 (1789) (Gales & Seaton eds., 1834).

[76] *See* 2 ELLIOT'S DEBATES, *supra*, at 196 (Oliver Ellsworth of Connecticut) ("This Constitution defines the extent of the powers of the general government. If the general legislature should at any time overleap their limits, the judicial department is a constitutional check. . . . [I]f the states go beyond their limits . . . independent judges will declare it [void]."); *id.* at 445 (James Wilson of Pennsylvania) ("[U]nder this Constitution, the legislature may be restrained, and kept within its prescribed bounds, by the interposition of the judicial department.").

checking function of the judiciary was necessary to protect the People; as Hamilton explained, the courts were "designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority."[77]

The Founding generation expected that the judiciary would protect the People from violations of constitutional rights at the hands of the legislature. At the North Carolina Convention, for example, William Davie remarked that "there are certain fundamental principles in [the Constitution], both of a positive and negative nature, which, being intended for the general advantage of the community, ought not to be violated by any future legislation of the particular states," but recognized "[w]ithout a judiciary, the injunctions of the Constitution may be disobeyed, and the positive regulations neglected or contravened."[78] Madison echoed this expectation in his speech proposing the Bill of Rights, explaining that independent courts would act as "the guardians of those rights" and would "be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights."[79] It was the "*duty*" of an independent judiciary "to declare all acts contrary to the manifest tenor of the constitution void" because "[w]ithout this, all the

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[77] THE FEDERALIST NO. 78, *supra*, at 524-25 (Alexander Hamilton).

[78] 4 ELLIOT'S DEBATES, *supra*, at 156.

[79] 1 ANNALS OF CONG. 457 (1789) (Gales & Seaton eds., 1834).

reservations of particular rights or privileges would amount to nothing."[80]

B. Legislative Partisan Gerrymandering Has Been Denounced Since the Founding as an Unconstitutional Abuse of Power

Appellants place significant weight on the fact that partisan gerrymandering has occurred throughout American history, yet was not brought before the courts for some time. *See* Brief for Appellants, *supra*, at 3-6, 37. But the use of a practice throughout history, even on a widespread basis, does not immunize the practice from judicial review. The long lead-up to the one-person one-vote cases provides a useful illustration of this concept.

Many gerrymanders in American history, several of which Appellants rely on, involved malapportionment—districts of unequal population size—and would therefore be impermissible today.[81]

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[80] THE FEDERALIST NO. 78, *supra*, at 524 (Alexander Hamilton) (emphasis added).

[81] Of course, the pre-Revolution gerrymanders raised by Appellants predate a formal requirement of apportionment in proportion to population. Before the writing of state constitutions, the legislatures simply assigned a certain number of representatives to geographic units without regard for the number of people in each unit. *See* ZAGARRI, *supra*, at 37-39. In many of their first state constitutions, Americans remedied this problem by adopting the principle that equal numbers of people deserved equal numbers of representatives. *See, e.g.*, PA. CONST. § 17 (1776). This was an important contribution to the

For example, Appellants point to what they call the first known gerrymander "on this side of the Atlantic," in the early 1700s in Pennsylvania. *See* Brief for Appellants, *supra*, at 3. That gerrymander involved an attempt to dilute the political power of Philadelphia voters by giving the city fewer representatives than other counties, despite the city's growing size.[82] Appellants next reference a 1732 gerrymander in North Carolina. *See* Brief for Appellants, *supra*, at 3. In that instance, the Governor had manipulated voting boundaries to promote his own agenda, in part by forming some "precincts . . . which contained not more than thirty families."[83]

Appellants go on to say that "partisan gerrymandering did not end with the ratification of the Constitution." Brief for Appellants, *supra*, at 5. They do not refer to specific gerrymanders, but a review of the history reveals that many post-ratification gerrymanders also involved districting that today would violate the one-person one-vote principle.[84] Yet despite a historical record spanning

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development of representative ideals—one that was ultimately incorporated into the structure of the House of Representatives.

[82] *See* ELMER C. GRIFFITH, THE RISE AND DEVELOPMENT OF THE GERRYMANDER 26-28 (1907).

[83] GRIFFITH, *supra*, at 28.

[84] *See* GRIFFITH, *supra*, at 42-43 (New York Federalist gerrymander in 1789); *id.* at 47-50 (New Jersey Federalist gerrymander in 1798); *id.* at 53-54 (Philadelphia Democratic gerrymander in 1802); *id.* at 79-80 (New Jersey Federalist gerrymander in 1812); *id.* at 94 (Maryland Democratic gerrymander in 1816); DAILY OHIO ST. J. (Aug. 12, 1842) (Ohio Democratic gerrymander in 1842).

more than 200 years, this Court in *Baker v. Carr*, 369 U.S. 186 (1962), ultimately "confronted this ingrained structural inequality" and ended the "[j]udicial abstention [that] left pervasive malapportionment unchecked." *Evenwel v. Abbott*, 136 S. Ct. 1120, 1123 (2016). This Court's recognition that unequal-population gerrymanders are unconstitutional and justiciable, and its ability in the decades since to decide such claims (as well as racial gerrymandering claims), undermines the ahistorical suggestion that the Framers saw no role for the judiciary in this sphere.

Moreover, partisan political gerrymandering throughout history has been routinely denounced as unconstitutional, dangerous to the republic, and a violation of citizens' prized right of representation. The first gerrymander in the American republic is generally thought to be Patrick Henry's attempt in 1788 to deny James Madison a congressional seat by grouping Madison's home county in a district with counties believed to be more favorable to Henry's anti-Federalist cause. Although the scheme did not result in an irregularly-shaped district (as some other early gerrymanders did), the Founding generation greeted it with outrage. The press decried the scheme as a violation of the right of a free people to choose their representatives and a destruction of the majority's ability to decide.[85] The practice received still greater attention, and renewed condemnation, when Elbridge Gerry signed the notoriously outrageous 1812 districting bill that would give gerrymandering its

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[85] GRIFFITH, *supra*, at 40-41.

name.[86] Public outcry was immediate and fierce. The newspaper that published the famous political cartoon depicting the "Gerry-Mander" also decried it as a partisan violation of "the Rights of the People" and declared:

> "This Law inflicted a grievous wound on the Constitution,—it in fact subverts and *changes our Form of Government*, which ceases to be *Republican* as long as an *Aristocratic* House of Lords under the form of a Senate tyrannizes over the People, and silences and stifles the voice of the *Majority*."[87]

Several counties issued resolutions condemning the gerrymander, and towns sent remonstrances to the legislature denouncing it as unconstitutional.[88] Federalists decried it as a threat to the safety of republican institutions, which contravened the Constitution and the Bill of Rights by usurping the majority's prerogative to govern.[89] Later that decade, Massachusetts Federalists took control of the state legislature and—still viewing the 1812 gerrymander as a grave injustice, but evidently believing it justified their engaging in similar actions—passed a new

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[86] *Id.* at 16-19.

[87] *The Gerry-Mander, or Essex South District Formed into a Monster!*, SALEM GAZETTE, Apr. 2, 1813.

[88] GRIFFITH, *supra*, at 70-71.

[89] *Id.* at 71.

gerrymander to favor their party.[90] The Democratic-Republicans promptly denounced the Federalists' gerrymander as importing the English "rotten borough system."[91]

This pattern continued through the Fourteenth Amendment era and beyond. As the nature of representation increasingly came to be viewed as a national concern in the post–Civil War era, the topic of gerrymandering increasingly was raised by federal officeholders. For example, in 1870, future president James Garfield, then a congressman, acknowledged that he was a beneficiary of gerrymandering in Ohio yet emphatically declared that "no man, whatever his politics, can justly defend a system that may in theory, and frequently does in practice, produce such results as these."[92]

Thus, from the ratification of the Constitution through the passage of the Fourteenth Amendment and beyond, partisan gerrymandering has been forcefully denounced as unconstitutional and contrary to the American vision of representation. Part of that vision was the independent judiciary's role as the "impenetrable bulwark" against legislative partisan entrenchment that sought to undermine effective representative government.

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[90] *Id.* at 88.

[91] *Id.* at 91 (internal quotation marks omitted).

[92] CONG. GLOBE, 41st Cong., 2d Sess. 4737 (1870).

C. Modern Partisan Gerrymandering Enhances the Threat to the Founding Principles of American Democracy

Extreme partisan gerrymanders today are distinct from gerrymanders of the past in ways that more directly threaten core constitutional values of actual, effective representation. Today's partisan gerrymanders, facilitated by big data and sophisticated targeting technology, create the potential for persistent entrenchment—a powerful advantage persisting for multiple election cycles despite intervening shifts in public opinion. Such a result represents the Founding generation's worst fears of an unaccountable government.

Gerrymanders in earlier periods of American history were often crude and ineffective as mechanisms of entrenchment. Gerrymanders built on county-level voting data were not particularly robust, and parties routinely miscalculated their relative levels of support.[93] The greater quantity and quality of demographic data available today allow parties to target voters more precisely and gauge their support more accurately. Today, the nation faces what

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[93] *See, e.g.*, ZAGARRI, *supra*, at 115-18 (discussing repeated miscalculations that hindered New Jersey Federalists' early attempts to gerrymander congressional districts). Likewise, in the late nineteenth century, the crude nature of the data and tools available for partisan gerrymandering created volatility that rendered partisan gerrymanders impermanent. *See, e.g.*, J. MORGAN KOUSSER, COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION 45 fig.1.7 (1999) (depicting high levels of volatility in selected congressional elections from 1864 to 1900).

commentators have described as "the specter of elected officials and party officers using high-end technology and increasingly fine-grained data about voters to create maps that lock in their advantage and shut out opponents for years."[94]

According to the findings of the courts below, the partisan gerrymanders at issue in these cases are examples of this phenomenon. In Maryland, a political consulting firm used sophisticated software to draw a map that would create a 7-1 Democratic advantage by flipping the Sixth Congressional District from a predicted "Solid Republican" to "Likely Democratic" score—the largest swing of any district in the country. *See Benisek v. Lamone*, 348 F. Supp. 3d 493, 507 (D. Md. 2018). The Sixth District did flip, and a Democratic candidate was elected in the three subsequent elections. *Id.* at 519. In North Carolina, the map drawer similarly used software that relied on past voting data to draw lines according to partisan advantage; the committee predicted and ultimately obtained a 10-3 Republican advantage. *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 805-07, 810 (M.D.N.C. 2018).

Thus, modern partisan gerrymanders can successfully accomplish what the Framers sought to avoid—political entrenchment of partisan factions that suppresses effective representational rights. A legislative coalition safe in the knowledge that it could lose every swing seat and yet maintain control of the legislature does not satisfy the Founding generation's

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[94] Jerry H. Goldfeder & Myrna Pérez, *A Tale of (at Least) Two Gerrymanders*, N.Y.L.J. (June 22, 2017).

vision of representative government. When gerrymandering "render[s] Representatives responsive to the state legislatures who drew their districts rather than the People," *id.* at 940, it effectively defeats the historic vision of actual representation. Further, the durable nature of today's extreme partisan gerrymandering, permitting a partisan faction effectively to entrench itself throughout the decennial redistricting cycle and control the tools of entrenchment for the next one, means it is exceptionally difficult, or even impossible, for disadvantaged voters to remedy their constitutional injury through the political process. This is the very risk that the Founding generation identified and sought to avoid: that voters targeted by the practice will "complain from generation to generation without redress."[96]

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As this Court said in *Wesberry*, 376 U.S. at 17, relying heavily on the Framers' ideals, "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." The Constitution "leaves no room for classification of people in a way that unnecessarily abridges this right." *Id.* at 17-18. As Alexander Hamilton expressed it, the Constitution does not

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[96] RECORDS, *supra*, at 578 (statement of George Mason).

"enable the representatives of the people to substitute their *will* to that of their constituents."[96]

Extreme partisan gerrymandering runs counter to the Founding generation's most fundamental aspiration: to create a full, fair and effective system of political representation that reflects the will of the People. The judiciary was designed to function as an "impenetrable bulwark" against infringements on the People's right to representation. Without the courts' protection, legislative assemblies might cease to "be bodies which are collectively responsive to the popular will." *Reynolds*, 377 U.S. at 565. The constitutional right of each citizen to "an equally effective voice," *id.*, in the election of members of the legislature would be rendered illusory. As the historical record demonstrates, only a system free of partisan gerrymandering conforms to the American vision of representative, responsive democracy.

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[96] THE FEDERALIST NO. 78, *supra*, at 525 (Alexander Hamilton).

CONCLUSION

For the foregoing reasons, *amici* respectfully urge this Court to affirm the decisions below.

Respectfully submitted,

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APPENDIX

APPENDIX

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Jonathan Gienapp is Assistant Professor of History at Stanford University. Principally a scholar of Revolutionary and early republican America, he has focused especially on the period's political culture, constitutionalism, and intellectual history. His forthcoming book, FIXING THE CONSTITUTION: THE TRANSFORMATION OF CONSTITUTIONAL IMAGINATION AT THE AMERICAN FOUNDING (Harvard University Press), explores how and why Founding-era Americans' understanding of the Constitution transformed in the early years of the republic. He has written widely on the relationship between historical practice and constitutional originalism and is currently working on a large project exploring how Americans' understanding of "democracy" evolved in the late eighteenth and early nineteenth centuries.

Hendrik Hartog is the Class of 1921 Bicentennial Professor in the History of American Law and Liberty and Director of the Program in American Studies at Princeton University. His scholarly work focuses on the social history of American law, including the history of constitutional rights claims and the historiography of legal change. Among other published works, he is the author of *The Constitution of Aspiration and "The Rights That Belong to Us All,"* 74 J. AM. HIST. 1013 (1987), and editor of LAW IN THE AMERICAN REVOLUTION AND THE REVOLUTION IN THE LAW (1981).

Alexander Keyssar, the Matthew W. Stirling, Jr. Professor of History and Social Policy at Harvard University, specializes in historical issues with

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